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Supreme Court, U.S.
FILED

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No.

IN THE

# Supreme Court of the United States

TIMOTHY GREY, PETITIONER

*v.*

DALLAS INDEPENDENT SCHOOL DISTRICT; MANUAL VASQUEZ; CEDRIC PORTLEY; DAN CLAXTON; GARY HODGES; LUIZ TAMEZ

*PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## PETITION FOR WRIT OF CERTIORARI

TIMOTHY GREY
*pro se*

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## QUESTIONS PRESENTED

1. Does Grey's record raises a genuine fact issue as whether race was a motivating factor in his termination under Title VII Discrimination? and the grievance filed on February 15, 2002 and May 2, 2002 in the Dallas Independent School District Office of Employee Relation establish as to whether he engaged in a protected activity under Title VII Retaliation?

2. As a matter of law, did Grey engaged in a protected activity under Title VII Retaliation when he filed internal grievances on February 15, 2002, and May 2, 2002 in the Dallas Independent School District Office of Employee Relations.

3. Does Grey's as a School Resource Police Officer with the Dallas Independent School District under Section 1983 – Fourteenth Amendment Liberty Interest have a protected liberty interest because he was an employee of a governmental employer who was publicly discharge under stigmatizing circumstances?

4. As a School Resource Police Officer with the Dallas Independent School District under Section 1983 Denial of Property Interest, does Grey have a constitutional protected property interest in his expectation of continued employment when the Dallas Independent School District policy abrogates its rights to terminate him without cause?

5. Was it an abuse of discretion to deny Grey motion to compel when the defendants withheld discoverable information that would have change the outcome and the only apparent justification was to adhere to a scheduling

order that was improperly imposed when Grey was *pro se*?

6. Was it an abuse of discretion to grant Defendants' motion for protective orders when defendants failed to show good cause, and failed to provide the certification required by Rule 26 (c), Fed. R. Civ. P. and the only apparent justification was adherence to an improperly imposed scheduling order?

7. However, when Grey failed to respond to defendants summary judgment motions was caused by (1) improperly imposed scheduling orders, (2) Defendants' refusal to meet their discovery obligations, (3) erroneous rulings on discovery motions, (4) excusable neglect due to the inability of Grey's attorney to prepare the case in the available time, despite Grey's diligence, and the needed discovery would have produced evidence that would defeat summary judgment, should the judgment be vacated to prevent manifest injustice?

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## OPINIONS BELOW

The unpublished *per curiam* of the United States Court of Appeals for the Fifth Circuit in *Timothy K. Grey v. Dallas Independent School District, Manual Vasquez, Cedric Portley, Dan Claxton, Gary Hodges, and Luiz Tamez* (La. No. 06-10779), determine that this opinion should not be published and is not precedent except under the limited circumstances set forth in the 5th Cir. R. 47.5.4

The unpublished Memorandum Opinion of the United States District Court for the Northern district of Texas in *Timothy K. Grey v. Dallas Independent School District, Manual Vasquez, Cedric Portley, Dan Claxton, Gary Hodges, and Luiz Tamez* (Civil Action USDC No. 3:04-CV-1164), determined on December 30, 2005, granting the respondents Dallas Independent School District, Manual Vasquez, Cedric Portley, Dan Claxton, Gary Hodges, and Luiz Tamez motion for summary judgment

The unpublished order of the United States Court of Appeals for the Fifth Circuit in *Timothy K. Grey v. Dallas Independent School District, Manual Vasquez, Cedric Portley, Dan Claxton, Gary Hodges, and Luiz Tamez* (La. No. 06-10779) filed February 14, 2008, denying the petitioner Timothy K. Grey's timely filed petition for rehearing is set forth in

## JURISDICTION

The decision of the Fifth Circuit Court of Appeals affirming the District Court's order granting the respondents Dallas Independent School District,

Manual Vasquez, Cedric Portley, Dan Claxton, Gary Hodges, and Luiz Tamez motion for summary judgment was entered on December 30, 2005; and its order denying the petitioner Timothy K. Grey timely filed petition for rehearing was filed February 14, 2008. This petition for writ of certiorari is filed within ninety (90) days of the date of the court of appeals' denial of the petitioner Timothy K. Grey timely filed petition for rehearing. 28 U.S.C. Section 2101(c). Revised Supreme Court Rule 13.3. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Section 1254(1).

## RELEVANT PROVISIONS INVOLVED

*United States Constitutional, Amendment I*

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the government for a redness of grievances.

*United States Constitutional, Amendment V*

> No person shall...be deprived of life, liberty, or property, without due process of law....

*United States Constitutional, Amendment XIV, Section 1:*

> ...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state

deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

*28 U.S.C. Section 1343(a)(4):*

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

*Civil rights Act-42 U.S.C. Section 1983:*

Every person who under color of any statue, ordinance. Regulation, custom, or usage, of any State Territory or the District of Columbia, subjects, or causes to subjected, any citizens of the United States or there person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

## STATEMENT

On May 28, 2004, Timothy Grey ("the petitioner") sued the Dallas Independent School District and five of its individual employees, Manual Vasquez, Cedric Portley, Dan Claxton, Gary Hodges,

and Luiz Tamez ("the respondents") for damages under Title VII and 42 U.S.C. Section 1983. The District Court granted summary judgment for all respondents by Memorandum Opinion and Order dated December 30, 2005. Petitioner move to vacate the judgment on January 17, 2006 under Rule 59(e), Fed. R. Civ. P., conceding his claims against Portley, Claxton, Hodges, and Tamez, leaving only Dallas Independent School District and Vasquez as defendants affected by the outcome of the appeal in the Fifth Circuit. The Court denied the Motion to Vacate on June 14, 2006. Petitioner filed Notice of Appeal on July 10, 2006.

*Facts*

Petitioner is a black male who worked as a School Resource Police Officer for the respondent (Dallas Independent School District) from February 5, 2001 until August 14, 2002 when he was terminated. In January 2002, DISD Police Lt. Cedric Portley told petitioner his driver's license had been suspended for failure to show proof of insurance. Portley put petitioner on non-driving status until his driver's license status was clear up. The first night on non-driving status, petitioner went to "lunch" with Officer Perry in Perry's patrol car, intending to return to headquarters after the meal. Perry received a call that prevented him from returning petitioner to headquarters until the end of the shift. Since this was unanticipated, at the end of the shift, petitioner waited for Vasquez to come in and reported what had happened. Vasquez told the petitioner that was no problem. He knew putting the petitioner in central control (dispatch) was just a time killer and said if petitioner could do something useful he should go ahead

and do it. Vasquez said if petitioner could assist another officer who needed help, or help train inexperienced officer, that was fine. The next night Perry asked petitioner to go out with him again and petitioner rode with Perry a second time. Officer Sylvia Chappa, an inexperienced officer, asked petitioner to ride with her and demonstrate proper procedure for patrolling a large building and investigating a break-in. Petitioner rode with her on two nights. Portley reported petitioner to Chief Vasquez for riding with other officers on patrol, saying he had ordered petitioner to remain in headquarters, not merely refrain from driving. Petitioner call Chief Vasquez for clarification because he believed Vasquez had approved his riding with Perry and Chappa. Vasquez repeated his previous instructions and petitioner was return to patrol duty.

On February 13, 2002, Police Captain Dan Claxton and Lt. Cedric Portley delivered a memo to petitioner that listed the times petitioner rode with other officers, declared that petitioner had refused to perform a work assignment, and demanded an immediate written response. Claxton and Portley accused petitioner of insubordination in the driver's license incident in January. Petitioner believed Chief Vasquez had approved his actions a month earlier. Petitioner did not trust Claxton and Portley because they were known fabricators. Petitioner wanted a witness or attorney to protect his interest. Petitioner response was a handwritten note: "You want to talk we can talk to my attorney."

The Dallas Independent School District personnel management policy gives employees the

right to representation by an attorney, even in informal attempts to resolve problems before filing a grievance. Policy DGBA, Sec. III, Rule 3 (R. 1041). On February 14, 2002, Vasquez notified petitioner he was under investigation for insubordination. Petitioner was relieved of his police credentials, ordered not to perform police related duties and transferred to a different shift. Prior to the confrontation with Claxton and Portley, petitioner had never been disciplined. Petitioner asked Chief Vasquez why was he being investigated for an incident that was resolved a month earlier. Vasquez said petitioner's request for an attorney "had made it to the Administration Building." Vasquez told petitioner he was being investigated because his request for an attorney "had opened a can of worms" and petitioner "was going after" the Chief. Vasquez said he was taking action against petitioner because he believed the statement about wanting an attorney was directing at him [Vasquez], and not just Claxton and Portley.

Petitioner's filed a grievance against Portley, Claxton, and Vasquez on February 15, 2002, the day after being stripped of police credentials and put under investigation by Vasquez. This grievance complained of retaliation, hostile work environment and despair [disparate?] treatment. Petitioner felt that Vasquez would continue to retaliate for filing this grievance. "Chief Vasquez has a history of practicing retaliatory conduct towards officers who opposed him or speak up for themselves. Chief Vasquez also have been proven guilty for retaliation by EEOC." This remark refers to the case of Dallas Police Sgt. Lee Bush who sue the Dallas Police Department and Vasquez (when Vasquez was Executive Assistant Chief of DPD) for race

discrimination in promotion and job assignments. Bush's case survived summary judgment, and the City paid $300,000 to settle. *Bush v. City of Dallas*, No. 3-98-CV-0365H, N.D. Texas.

On April 30, 2002, petitioner received a letter giving notice that Vasquez was "recommending that [petitioner] employment be terminated, for *good cause*, pursuant to Board Policy DCD (Local)," citing five policy provisions: (1) DCD-Local #1 (failure or refusal to comply with policies); (2) DCD-Local #20 (insubordination); (3) DCD-Local #27 (conduct that could cause loss of confidence in the district); (4) DCD-(failure to meet acceptable standards of conduct); and (5) DCD-Local #33 (tardiness and excessive absences). (Emphasis added). The letter advised that if petitioner wished to appeal, he must make a written request, files with Luiz Tamez, within ten days. The letter, dated April 19, set the hearing on April 29, 2002. this was crossed out and handwritten note inserted: "Letter issued April 30 at 7:00 A.M." No hearing date was set.

Petitioner filed a second grievance on May 2, 2002 to appeal the recommendation for termination. He asserted Vasquez' action was retaliation for filing the first grievance in which petitioner accused Vasquez of making "retaliatory comments and displaying discriminatory practices." Petitioner should have had a Level I hearing on his May 2, 2002 grievance within five working days. (DISD Policy DGBA, rule 5, R. 1012). At Level I hearing is a meeting with the immediate supervisor, who is to render a written decision within five days. As a School Resource Police officer, petitioner was considered support personnel. (Megginson Affidavit, R. 1052). District Policy DCD

(Local) establishes grounds for dismissal. "Support employees may be recommended for termination for offenses that justify immediate dismissal or for uncorrected job performance or conduct deficiencies." (RX 59, R. 1020). DCD (Local) lists 33 "Offenses" for which an employee may be recommended for termination. In addition to the grounds in petitioner's notice, other ground for termination include: indecent, obscene, illegal, cruel, abusive acts; immorality, public lewdness, other acts of moral turpitude, conviction of a felony or crime of morale turpitude, abuse or possession of illegal drugs, physical or verbal abuse of students or parents, stealing.

DISD policy DCD (Local) gives support employees hearing and appeal rights if they are recommended for termination. District policy DGBA, Section III, "Grievance Procedure," list 20 Procedural Rules applicable to all adverse personnel decisions. The rules include the following: All time limits must be strictly complied with. The employee and the administration shall attempt to resolve the problem informally before the employee files a grievance. The employee is entitled to have a representative. If the grievance is filed with the wrong administrator, the administrator who receives the grievance is required to forward it to the proper administrator and promptly notify the grievant. If the grievance is not settled informally, "upon request of the grievant, the administrator with whom the grievance is pending shall set the matter for a formal hearing which must be held within five days. A written Level I decision must be rendered within five days. A dissatisfied grievant may appeal in writing in five days. Similar procedures apply to Level II, III, and IV hearings. Petitioner was not

terminated for a job performance problem. (Hearing Panel Decision, r. 1048-50). Petitioner received only one Performance Appraisal while he was with DISD. (Ex. H, App. To response to Vasquez' Second Motion to Dismiss, R. 308). Only two ratings were used, "Meet Expectations" and "Below Expectations." Petitioner's evaluation was "Meet Expectation." Petitioner" Performance Appraisal contains the following statement:

> "According to state law, employees are ineligible for unemployment compensation payments during the summer months if they are given reasonable assurance that they will be returning to work following the summer recess. This MEETS EXPECTATIONS EVALUATION, for unemployment compensation purposes, constitutes your reasonable assurance of employment continuity, subject to the normal budgetary a considerations and your continued job performance of MEET EXPECTATIONS."

Luiz Tamez was DISD's Coordinator of Employees Hearing and Grievances. Tamez was responsible "for coordinating and facilitating all aspects of the District's employee grievances process, including scheduling requested hearings." Petitioner should have had a Level I hearing within five working days after February 15, 2002. Tamez states: "On March 19, 2002, I received a telephone call from petitioner during which he inquired as to the processing status of his February 15, 2002 Grievance. I informed the petitioner that per District policy, he needed to file his grievance with his immediate supervisor." Under DGBA Rule 4, Tamez was required to "enter the date and time of receipt on

the formal grievance papers and endorse same" and "forward the grievance to the appropriate individual for processing and promptly notified the grievant." He did not do that. Tamez did not schedule the February 15, 2002 for a hearing. Tamez did not arrange a Level I hearing on petitioner's second grievance. Instead he arranged what he called a "termination hearing" on August 6-7, 2002 which "served as the hearing on petitioner's May 2, 2002 grievance. The hearing was before a three member panel. The format of the hearing cannot be found in DISD's personnel rules. Tamez does not explain the failure to follow the procedures in District Policy. The Panel sustained all five grounds in Vasquez' recommendation. (Panel Decision, R. 1048-50). DISD listed Vasquez as a key witness but he did not testify or even appear. "In August 2002, [Tamez] discovered that the grievance petitioner filed o February 15, 2002 had not been resolved."

On August 19, 2002, Tamez called petitioner and offered a hearing. Petitioner consulted his attorney and accepted. A letter dated August 27, over Vasquez' signature, notified petitioner a hearing (characterized as a Level II hearing) on the February 15, 2002 grievance against Vasquez was schedule for August 29, 2002. Petitioner and his attorney appeared for the hearing. Vasquez was Hearing Officer. His decision, issued the same day, in its entirety, reads as follows: "After consideration of the information supplied, it id my decision to deny the grievance in its entirety, as the grievance is without merit." Petitioner filed for a Level III grievance hearing and for a hearing before the School Board, but neither was granted. Sophia Graham recounts overhearing Vasquez talking to Tamez on his

speaker-phone on August 27, 2002. Vasquez said: "Tamez you need to take of care of those grievances and do away with it that petitioner has filed in your office immediately. I don't want those or this matter coming up later on." He added: "We got rid of him and I don't want him back in my department. I had him terminated." Petitioner filed charges of discrimination on November 20, 2002. He received a right to sue letter dated April 28, 2004. Petitioner filed this suit *pro se, in forma pauperis* on May 28, 2004. Local Rule 16.1 (f) exempts *pro se* cases fro the scheduling and case management procedures of Rule 16(b), Fed. R. Civ. P. On October 25, 2004 a standard Schedule Order was entered setting the following deadlines: mediation, Dec. 27, 2004; discovery cut-off, May 31, 2005; dispositive motions, June 31, 2005; trial Oct. 3, 2005.

On August 17, 2004, Vasquez filed a motion to dismiss. DISD filed a motion for partial judgment on the pleadings.

On November 4, 2004 respondents moved to postpone mediation asserting their pending motions "might resolved many or all issues in the case," and if the case was not dismissed, "additional discovery may be needed" for meaningful mediation. The delay was granted on December 30, 2002. A settlement conference before Magistrate Judge Paul Stickney on Feb. 7, 2005 was unsuccessful.

On November 15, 2004 petitioner filed a response to respondents motion to dismiss for judgment on the pleadings.

On March 1, 2005, the Court denied motions and order petitioner to replead. Petitioner filed an amended complaint on March 31, 2005.

On April 11, 2005, Vasquez filed a second motion to dismiss.

On May 11, 2005, DISD filed a second motion for partial judgment on the pleadings.

On April 4, 2005 petitioner served interrogatories and requests for production on respondents. DISD served responses on April 20, 2005. (Verification dated April 20, 2004, R. 616-17). DISD chose to answer interrogatories by producing business records pursuant to Rule 33(d), Fed. R. Civ. P. (DISD Responses to petitioner's interrogatories, R. 606-18).

On May 10, 2005, believing DISD's discovery responses were inadequate, petitioner called DISD's attorney asking for complete responses. (Letter to Judge Kinkeade, R. 346-47). DISD's responses was DISD had produced everything it was going to; if petitioner wanted more, to file a motion to compel. On May 10, petitioner wrote a letter to the court which was essentially an informal motion to compel in which he attempted to explain his difficulties in getting DISD to cooperate in discovery. This document was served on DISD and filed on May 12. Over three months remained before discovery cut-off.

On May 12, 2005 respondents moved to extend the time for discovery, dispositive motions, excerpt witness discovery and the trial date.

On May 17, DISD hand delivered a letter to the Court in response to petitioner's informal motion to compel, self-righteously protesting that petitioner made a "glaring misrepresentation to the court, boasting that "these respondents have produced pages of documents to petitioner." The Court never dealt with the dispute raised by the petitioner's letter and DISD's response. Respondents deposed petitioner on June 9, 2005. The 184 page deposition lasted nearly five hours and identifies 38 exhibits.

On June 13, 2005 the Court granted respondents motion to amend scheduling order in part, extending discovery to July 5, and motions to July 18, 2005.

On June 24, 2005, DISD filed motion to compel completion of disposition and production of documents. DISD requested extension of discovery and dispositive motion deadlines "so that respondents may obtain *necessary discovery* from petitioner, and prepare their motion for summary judgment," claiming the information was *"crucial"* to their defense and "petitioner' failure to provide discovery has prejudiced respondents in he preparation of their case for trial and their preparation of a dispositive motion...All of these inquiries are necessary to the defense of respondents' case. Petitioner's refusal to answer these and other questions has hampered respondents' preparation of a motion for summary judgment."

On July 1, 2005, without a hearing or awaiting petitioner's response, the Court ordered petitioner to respond to respondents' discovery by July 8 and extended the discovery deadline, noting: "Mr. Grey is proceeding pro se and until this point the Court has

liberally granted Mr. Grey's request for extensions. Absent extraordinary circumstances, however, the Court will not grant any more extensions due to the immediacy of the upcoming trial date." At that point, petitioner had obtained two extensions to respond to respondents' motions, neither of which required changing the scheduling order. At that point, respondents had obtained three modifications of the scheduling order.

On July 5, 2005, DISD hand delivered a letter to the Court pointing out the new discovery cut-off was after the dispositive motion date. On July 6, the Court entered a new scheduling order setting discovery cut-off on August 31, dispositive motions on September 30, and the trial on January 9, 2006.

On August 1, 2005 the Court, *sua sponte*, postponed the trial date to February 6, 2006. The following table summarizes the changes to the scheduling order:

| Date | Movant | Motion | Order |
|---|---|---|---|
| 11/4/04 | Respondents | Extend Mediation | Granted 12/03/04 (R. 157-61) (R. 202-03) |
| 5/12/05 | Respondents | Amend Scheduling Order | Granted 6/13/05 (R. 348-55)(R. 378) |
| 6/24/05 | Respondents | Compel and | Granted |

| | | | |
|---|---|---|---|
| | | more time | 7/1/05 (R. 397-455) (R. 467) |
| 7/5/05 | Respondents | Letter re motions (Doc. 63) | Granted 7/6/05 (R. 648-81) (R. 482) |
| 8/1/05 | Court | Court – Reset trial | Granted *sua sponte* (R. 500). |

On July 25, 2005, petitioner filed a response to respondents motion to compel which stated "Petitioner agrees the parties should have additional time to conduct discovery and file dispositive motions. Respondents have failed and refused to provide documents in discovery that are necessary for preparation of petitioner's motion for summary judgment and for trial. Petitioner is filing a motion for compel the respondents to meet their discovery obligations. Petitioner need to depose the respondents to prepare for depositions and identify witnesses."

On August 1, 2005, the court reset trial to February 6, 2006.

On August 17, 2005, prospective counsel for petitioner contacted the respondents and advise if he entered the case, he would have to depose respondents on short notice, but agree to try to arrange a convenient schedule. On August 25, 2005, with six days remaining until the discovery cut-off, counsel entered

an appearance for petitioner and noticed depositions of respondents.

On August 26, 2005, DISD moved for a protective order, asserting: (1) the notice "is unreasonable and inadequate," (2) "Petitioner's request is overly broad and untimely," (3) the "deadline for discovery expires on Wednesday August 31, 2005, and (4) petitioner has failed to provide discovery on his own." This motion was not sworn or support by affidavit.

On August 29, 2005, Vasquez moved to quash and for a protective order, asserting the notice did not give a reasonable time.

Petitioner responded on August 31, 2005 with a motion to compel depositions and a motion to compel responses to petitioner's interrogatories and requests for production, asserting short notice was reasonable in the circumstances, and petitioner did not take depositions sooner because he was unemployed and did not have enough money to pay for a court reporter.

Petitioner's motion to compel asserted (1) DISD's answers did not comply with Rule 34(b), (2) DISD's responses were incomplete, (3) DISD's non-specific objections were improper, and (4) although, in April DISD promised responsive documents will be produce," by September, no further documents had been produce. The motion informed the Court the discovery would statistical evidence that would prove a *prima facie* case of discrimination, it would prove disparate treatment, it would prove a widespread pattern or practice of discrimination constituting an

official policy, and provide evidence to overcome the defense of qualified immunity.

Vasquez filed a motion for summary judgment on September 30, 2005. The appendix includes 53 pages from petitioner's deposition, 47 pages of exhibits, and Vasquez' affidavit. When a response to the motion was due the Court had not ruled on any of the pending discovery motions.

DISD's motion for summary judgment was filed on October 27, 2005. DISD's appendix contains a copy of petitioner's entire 184 page deposition (reproduced four pages to one). Affidavit of respondents and DISD employees, DISD policies and other documents. DISD never bothered to "complete" petitioner's deposition.

When a response to DISD's motion was due the Court had not ruled on any of the pending discovery motions. Petitioner did not file written responses to respondents' dispositive motions.

On December 30, 2005 the Court granted respondents' motion for summary judgment entered judgment for respondents, granted respondents' motion for protective order, denied petitioners' motion to compel, and denied all other pending motions as moot.

On January 17, 2006, petitioner moved to vacate the judgment. Petitioner's motion informed the Court that (1) DISD's discovery responses were incomplete (R. 1096), (2) did not comply with the rules (R. 1096), (3) despite petitioner's effort to secure compliances without court intervention it had been necessary to file motions to compel (R. 1096), (4) that is DISD provided

information responsive to interrogatory 11, it would prove disparate treatment ( the element of petitioner's discrimination claim the court found missing) (R. 1097), (5) that DISD had promised "documents responsive to this interrogatory will be produce" but had never produce them (R. 1097), and (60 that petitioner's motion to compel made it clear that petitioner could not have filed a proper response to the dispositive motions without the missing discovery materials. (R. 1098-99). The Court denied petitioner's motion to vacate on June 14, 2006.

## REASONS FOR GRANTING THE PETITION

1. The Result Below In The Decision Of Granting the Motion For Summary Judgment Was An Error. Decisions Establishing Summary Judgment Procedure. Under 42 U.S.C. Section 1983, *Raymond Reece v. Houston Lighting & Power Company* 29 U.S.C. 185(a) Section 301 Labor- Management Act, ( Allege Race Discrimination And Retaliation *In 215th Judicial District Court Of Harrison County), Anthony Ash and John Hithon v. Tyson Foods, Inc.*, Civil Rights Act, 42 U.S.C. 2000 2(a)(1) Section 703(a)(1), Section 1981 Of 42 U.S.C. Unlawful Employment Practice For An Employer To Discriminate Against Any Individual With Respect To His...Terms, Conditions, Or Privileges Of Employment Because Of Race, Color, Sex, Or National Origin

Title VII Discrimination. Respondents' evidence, viewed most favorably for petitioner, supports a reasonable interference to discrimination. Respondents proffered self-serving, conclusory statement as ostensible non-discriminatory reasons for dismissal. Evidence properly before the Court raises a fact issue as to whether respondents' stated reasons are

untrue (pretext). Disbelief of respondents' stated reasons, coupled with suspicion of mendacity, is sufficient to prove intentional discrimination. This is a credibility issue that should be decided by a jury. DISD's evidence shows petitioner filed internal grievances complaining of race discrimination. As a matter of law, filing a grievance on race discrimination is a protected activity. DISD was not entitled to summary judgment on this issue.

The court misapprehended the meaning of the two grievances petitioner filed when it held that the grievances did not charge Title VII violations and thus were not protected activities. The first, filed February 15, 2002, the day after Vasquez put petitioner under formal investigation for alleged insubordination, stated that other officers accused of insubordination had not been disciplined, that Vasquez had shown "despair" [disparate] treatment towards himself and other officers, that Vasquez was retaliating against petitioner because he believe petitioner was "out to get him" and that EEOC had previously found Vasquez guilty of retaliation. The first grievance does not explicitly state that Vasquez discriminated against him because of race, but that is the clear implication. The reference to the EEOC shows he was charging discrimination that violated Title VII.

The second grievance was filed on May 2, shortly after Vasquez notified petitioner he was recommending petitioner's termination. The second grievances states that Vasquez action to terminate petitioner was strictly retaliation for filing the first grievance in which petitioner complained of retaliation and discrimination. It states that the recommendation for termination was

an act of discrimination. The grievance put respondents on notice that petitioner was charging discrimination and retaliation violations of Title VII. Making a charge of discrimination is a protected activity under Title VII. Petitioner prepared these grievances when he was not represented. They should be construed liberally in his favor.

2. Section 1983 Liberty Interest. The Court misapprehends the nature of petitioner's liberty interest claim. Petitioner does not merely claim damages to his reputation. Petitioner was an employee of a governmental employer. Public employees who are discharged from public employment under circumstances that put their reputation, honor, or integrity at stake and impose a stigma or other disability that forecloses other employment opportunities, have a constitutionally protected liberty interest as a matter of law. The Fifth Circuit Court of Appeals has overlooked the evidence that shows petitioner was discharged under circumstances that put his reputation, honor or integrity at stake and imposed a stigma that has foreclosed other employment opportunities.

3. Section 1983 Property Interest. As a matter of law, if a governmental employer abrogates its right to terminate employees without cause, the employees have a constitutionally protected property interest in their employment. DISD abrogated its rights to terminate support employees without cause, when it adopted an official policy listing 33 specific serious offenses that would justify terminating support employees. The United States Fifth Circuit Court of

Appeals overlooked evidence that proves petitioner's claim.

2. The Fifth Circuit's Misapprehend Or Overlooked The Fact In The Opinion For Reargument Of Issues Of The Burden Which Civil Rights Plaintiffs Bear 42 U.S.C. Section 1983.

A petition for rehearing must point out each point of the law or fact that the court has overlooked or misapprehended. Fed. R. App. P. 40(2). The petition is intended to bring to the attention of the Fifth Circuit of Appeals claimed errors of law or fact in the opinion, and not for reargument of issues previously presented. 5th Cir. Rule 40.2

The elements of a Title VII retaliation claim are (1) the employee engaged in a protected activity, (2) an adverse employment action, and (3) a casual connection between the two. *Banks v. Baton Rouge Parish Sch. Bd., 320 f. 5670,575 (5th Cir. 2003).* There is no dispute that placing petitioner under formal investigation for alleged insubordination and terminating petitioner were adverse employment actions. In petitioner's first grievance he recites what Vasquez told him. What Vasquez told him is essentially an admission of retaliation. Vasquez denied retaliation in his affidavit, but did not deny making the statement petitioner attributes to him the first grievance. If the third element (casual connection) is not conclusively established, the evidence support a strong inteference of casual connection. The second and third element are satisfied. The stated Reason for rejecting petitioner's Title VII retaliation claim is "that petitioner failed to establish a prima facia case of Title VII retaliation

because he did not demonstrate that he engaged in a protected activity." An employee who files a compliant with his employer complaining of discrimination is engaging in a protective activity. *Long v. Eastfield College*, 88, F. 3d 300,306 (5th cir. 1996).

The evidence supporting petitioner's Title VII retaliation claim is the two grievances he filed, the first on February 15, 2002, and the second on May 2, 2002. The first grievance, states that other officers, who had actually been insubordinate in similarly serious matters, were not disciplined. Petitioner believed that Chief Vasquez had approved the acts in question so that the charge was both false and unfair. He refused to submit to immediate interrogation without a lawyer to represent him. His written response stated: "You want to talk, we can talk to my attorney." DISD policy DGBA (Local) permits any accused employee to have representation at any stage, even before any formal proceeding is commenced. Somehow, between the confrontation on the thirteenth, and being called in by Vasquez on the fourteenth, the incident with the officers, including petitioner's declination to submit to interrogation without an attorney, found its way "to the Administration building' and Vasquez believe it would cause him trouble.

On February 14, 2002, Vasquez called petitioner in and told him his response to these officers ('You want to talk, we can talk to my attorney.") "made it to the administration building." Vasquez accused petitioner of "being out to get him" and told petitioner his actions had 'opened a can a worms." Petitioner's grievance states: "then Chief Vasquez told me the reason why I was being investigated is that I had opened up a can of

worms on him and that I was going after him." Vasquez flatly told petitioner he was instigating a formal internal investigation of Portley and Claxton's allegation of insubordination because petitioner response 'made it to the administration building." A formal internal investigation is the first step in the process to impose serious discipline, including termination. The reasonable inference is that Vasquez commenced the investigation as a predicate to terminating petitioner, in retaliation for being "out to get him" and "opening a can of worms." If the administration knew of the confrontation between Portley and Claxton and petitioner, it would signal possible personnel problems in the Security Department, and could generate unwelcome inquiries from "the administration building."

The next day, petitioner filed his first grievance against Vasquez, Portley and Claxton. It stated that other officers, who had actually been insubordinate in similarly serious matters, were not disciplined. The grievance accused Vasquez of "despair" [disparate or discriminatory] treatment. It sated that Vasquez had previously been found guilty of retaliation by the EEOC. The EEOC investigates charges of discrimination in employment matters under Title VII. Petitioner's first grievance unquestionably charge of discrimination and stated that Vasquez had previously been found guilty of retaliation by EEOC. The most reasonable interpretation of a charge of disparate treatment and retaliation, accompanied by a claim that the person accused had been found guilty of retaliation by EEOC, is that the accuser is complaining of some form of discrimination that is unlawful under Title VII. The Title VII forbids race, sex, or age discrimination in

employment. Any of these charges is a protected activity under Title VII. Since petitioner was a young, black, male, it is reasonable to assume that his complaint was race discrimination, but it matters not what kind of discrimination he complained of, it only matters that he complained of discrimination within the ambit of the EEOC. The only reasonable interpretation of the first grievance is that it charges discrimination in violation of Title VII of the Civil Rights Act. The second grievance restates the original charge of discrimination and specifically charges that the subsequent recommendation for termination for discrimination is retaliation for filing the first grievance.

The court correctly states that Title VII does not require a plaintiff to prove that the conduct he opposed was actually in violation of Title VII, but only that a charge was made. The opinion justifies its holding by showing that petitioner did not explicitly say that the adverse actions were due to race discrimination. It says "petitioner first allegedly protected activity consisted of his statement to his superior officers, "You want to talk, we can talk to my attorney." Petitioner does not claim that statement, standing alone, is a charge of discrimination. That statement is part of the context in which he did charge discrimination. It precipitated the chain of events that ultimately resulted in his termination, but it was not a stand-alone charge of a Title VII violation. A careful reading of petitioner's first grievance shows that the first charged Title VII violation occurred when Vasquez placed petitioner under formal investigation for insubordination. Petitioner stated that being subjected to this investigation was a form of discipline. He stated

other officers who were insubordination and disrespectful were not disciplined at all. This is a charge of disparate treatment. He stated there were other officers that Vasquez, Portley, and Claxton had "shown despair treatment towards." The opinion states that this grievance did not refer to race. The grievance did say that EEOC had previously found Vasquez guilty of retaliation. Inserting this in the grievance gives that the grievant believes that conduct complained of is the type over which the EEOC has jurisdiction.

The court misapprehend the meaning and import of petitioner's grievance by failing to give them a liberal construction in his favor. Petitioner was unrepresented when he filed his grievances. He prepared them in his own handwriting, using his own words. A pleading filed by a *pro se* litigant must be liberally construe. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). Petitioner's grievances are the foundation documents on which this claim is based. Like pleadings, they too, should be liberally construed. It is obvious from reading the grievances that petitioner has an oblique writing style. He attempts to express ugly concepts (race discrimination and retaliation) in kinder, gentler, less confrontational language. Nevertheless, using ordinary rules of construction, the intent is clear, if the words are not. The court has construe it as strictly as if it were prepared by a law school professor. The law does not hold unrepresented persons to such a strict standard in interpreting their claims.

3. The Petitioner's Proof States A Viable Claim Under 1983 Fourteenth Amendment Liberty Interest Because DISD Conduct Violated The Petitioner's Due Process Rights.

The Fifth Circuit Court of Appeals has either misapprehended the nature of the petitioner's liberty interest claim, or has overlooked undisputed evidence on this point that establishes a liberty interest as a matter of law. He is not claiming mere damages to his reputation which could be remedied in a state law defamation action. His claim is based on rights that inure to him because he is an employee of a governmental entity. The adverse employment actions involve state action, and bring Fourteenth Amendment rights into play. A public employee has a protected liberty interest that is violated if he shows that his governmental employer discharged him on false charges that might seriously damage his standing and association in his community or impose a stigma or other disability that forecloses freedom to take advantage of other employment opportunities. *Board of Regents v. Roth*, 408 U.S. 564,573 (1972). The Fifth Circuit has stated this rule as follow: "Discharge from public employment under circumstances that put the employee's reputation, honor, or integrity at stake gives rise to liberty interest under the Fourteenth Amendment." *Rosenstein v. City of Dallas,* 876 F. 2d 393,395 (5th Cir. 1989). "To establish a liberty interest, an employee must demonstrate that his *governmental* employer has brought false charges against him that might seriously damage his standing and associations in the community," or impose a "stigma or other disability" that forecloses "freedom to take advantage of other employment opportunities." *Wells v. Hico*

*Independent School District*, 736 F2d 243,256 (5th Cir. 1984). The Fifth Circuit Court of Appeals affirmed the Northern District Court of North Texas holding that petitioner "did not have a protected liberty interest in his reputation and good name as a matter of law." While that could be a correct statement of law in the right circumstances, it is inapplicable in this case because (1) petitioner was a public employee, (2) DISD's evidence shows what charges brought against petitioner, and there is no doubt that those charges might seriously damage his standing in the community or impose a stigma that forecloses freedom to take advantage of other employment opportunities, and (3) DISD offered petitioner's deposition testimony which establishes that, in fact, petitioner's has repeatedly been denied employment because DISD makes his records (containing the stigmatizing grounds for his termination) available to prospective employers who invariably refuse to hire him.

DISD, petitioner's governmental employer, offered Vasquez letter recommending termination as summary judgment evidence. It lists the grounds justifying termination. They were (1) insubordination, (2) refusal to comply with policies, (3) conduct causing loss of confidence in the district, (4) failure to meet acceptable standards of conduct, and (5) tardiness or excessive absences. The Hearing Board Decision sustaining Vasquez grounds and sustains each of them. Those are stigmatizing charges that "might seriously damage his standing and association in the community." Respondents offered petitioner's deposition wherein he testified that he can't get a job nowhere" because DISD publicizes petitioner's records to prospective employers. Respondents have no-one

but themselves to blame for establishing all of the elements of petitioner's 1983 liberty interest claim.

The Fifth Circuit Court of Appeals relied on *Finch v. Fort Bend Indep. Sch. Dis.*, 333 F. 3d 555, 561 n. 3, for the proposition that "mere injury to reputation, even if defamatory, does not constitute the deprivation of a liberty interest. *Finch* is not controlling, and not even applicable in this case. The Opinion states that *Finch* rejected a former school principal's claim of a liberty interest in her good name. That is incorrect. The quoted statement was made in a footnote, but it is not clear why. The court could have been suggesting she should lose on the merits of her claim, in which event it would be the rankest of *dictum*. It could have been distinguishing the cases involving governmental employees from cases involving private sector employees, because it invites a comparison with the *Rosenstein* case, cited above, which petitioner relies on. In any event, it was not holding, but was merely gratuitous *dictum* in a footnote.

In *Finch*, Plaintiff sued the school district and several of its individual superintendents for alleged constructive discharge, asserting federal claims of violation of constitutional rights to freedom of speech and association and denial of substantive and procedural due process rights, together with pendent state law claims under the Texas Constitutional, and for breach of contract and interlocutory appeal from the trial court's denial of their motion for summary judgment on grounds of qualifies immunity. The court only ruled on the qualified immunity issue, expressly declining to rule on any other issue that might have been raised on the notice of appeal. *Finch* is not

authority on any issue in this case. *Rosenstein* is binding authority on the liberty interest issue in this case.

4. The Petitioner's Proof States A Viable Claim Under 1983 Fourteenth Amendment Property Interest Because DISD Conduct Violated The Petitioner's Due Process.

The opinion states: "Texas is an at-will employment state, and therefore petitioner bears the burden of proving the existence of a contract establishing a property interest in his continued employment," citing *Schultea v. Wood*, 27 f.3d 1112, 1116 (5th Cir. 1994). It observes that petitioner did not point a specific employment contract which altered his at-will status, and DISD offered an affidavit that showed that support staff do not ordinarily have employment contracts and are at-will employees. While a written employment contract which specifically provides that termination can only be for cause would clearly establish a protected property interest, that is not the only way to establish such an interest. The absence of an explicit contractual provision does not foreclose the existence of a Fourteenth Amendment property interest. *Perry v. Sinderman*, 408 U.S. 593,603 (1972).

The Fifth Circuit Court recognizes that a property interest is created where a public entity has acted to confer, or has created conditions which imply, the existence of a property interest by abrogating its right to terminate an employee without cause. *Muncy v. City of Dallas*, 335 f.3d 394,398 (5th Cir. 2003). DISD abrogated its right to terminate support employees

without cause by adopting DISD policy DCD (Local), a policy listing 33 specific offenses for which support employees could be *recommended* for immediate termination. It also adopted DISD policy DGBA (Local), a policy establishing detailed grievance and appeal procedures applicable to terminations. DGBA (Local) provides four levels of hearings and specific time periods for commencing or completing specific actions in the process. It will likely take months for the district to involuntary terminate an aggrieved employee. Termination will be anything but immediate under DISD's policies.

The court stated "The Defendants submitted affidavits and DISD policies showing that as support staff, petitioner did not have a written contract and was an at-will employee." Based on that evidence the court found "petitioner lacked a protected property interest in his DISD employment." The affidavit referred to is the affidavit of David Megginson who testified as a custodian of records. The substance of his affidavit is that petitioner did not have a written employment contract because his position was classified as support personnel and support personnel do not usually receive employment contracts. *Perry* and *Muncy* make this point irrelevant, because DISD policy DCD (Local) abrogates the District's right to fire support personnel without cause.

The opinion does not specify which DISD policy it relies on to show petitioner was an at-will employee. If the court has found a policy in the record that it perceives as permitting support employees to be discharged without cause, it has misapprehended the meaning or effect of such policy. The only possibly

relevant policies in the record are DCD (Local) (District Court Document No. 92-4, pp. 1-2 of 42) and DCD (Local) (District Court Document No. 92-4, pp. 3-4 of 42 ). For of this case, DISD has two types of policies, those classified as "Legal" and those classified as "Local." "Legal" policies do not represent any policy decision made by the School Board, but merely state the general law in a given area. "Local" policies are specifically adopted by the Board to provide operating rules for specific situations.

DCD(Legal) states that employment-at-will is general Texas law. It contains the following statements: "The employment-at-will doctrine places no duties on an employer regarding an employee's continued employment and thus *bars contract and tort claims* based on the decision to discharge an employee." "In Texas, at-will employment is presumed *unless shown otherwise.*" Employment for an indefinite term may be terminated at will and without cause, *except as otherwise provided by law.*" An at-will employment relationship, *standing alone without benefit of recognized exception*, triggers no due process requirement or right.

DCD (Legal) recognizes that *contract and tort claims* based on allegations of wrongful discharges are barred by at-will employment. With respect to constitutional claims, it is careful to point out that the at-will relationship, *standing alone, without benefit of any recognized exception* does not trigger due process, recognizing that the at-will relationship may be modified and if modified, can trigger due process.

DISD policy recognizes that at-will employment may be modified. DCD (Local) does just that, by listing 33 specific charges involving serious misconduct that must be sustained to terminate a support employee. The opinion overlooks DCD (Local) which, standing alone, modifies the at-will relationship and adopts a "for cause" requirement. Although support employees are denominated as at-will employees, substantively, their employment is not at-will.

It is DISD's summary judgment evidence that proves support employees may only be terminated for cause. This evidence was previously overlooked, because the Fifth Circuit Court of Appeals could not have ruled the way it did if it considered this evidence. Now that the Fifth Circuit Court of Appeals was made aware, it should have considered and hold that DISD has abrogated its right to terminate support employees at will, and adopted a "for cause" standard. This policy gives support employees a constitutionally protected property interest in their employment. Since it is DISD's own evidence that negates its defense to this claim, there were no reason not to consider it.

The United States Fifth Circuit of Appeals reviews a grant of summary judgment *de novo* and applies the same criteria as the Northern District Court of North Texas. *Fed. Deposit Ins. Corp v. Laguarta*, 939 F.2d 1231, 1236 (5th Cir. 1991). The Fifth Circuit Court of Appeals noted in *Little v. Luquid Air Corp.*:

> [T]he party moving for summary judgment must "demonstrate the absence of a genuine issue of material fact," but nee not negate the elements of the non-movant's case. If the moving party

> fails to meet this initial burden, the motion must be denied, regardless of the nonmovant's response. If the movant does, however, meet this burden, the nonmovant must go beyond the pleading and designate specific facts showing that there is a genuine issue for trial.....We resolve factual controversies in favor of the nonmoving party, but only when there is an actual controversy, that is, when both parties have submitted evidence of contradictory facts. *We do not, however, in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts.*

37 f.3d 1069, 1075 (5th Cir. 1994) (internal citations and quotations omitted).

The Northern District Court did not consider the materials petitioner submitted with his Rule 59(e) motion, so we review the court's order for an abuse of discretion. *Ford Motor Credit Co. v. Bright*, 34 F.3d 322, 324 (5th Cir. 1994).

The Northern District Court discovery ruling are review for abuse of discretion. *Turnage v. Gen Elec. Co.*, 953 F. 2d 206, 208 (5th cir. 1992).

## CONCLUSION

For all the reason stated herein, a writ of certiorari should issue to review and vacate the judgment of the court of appeals, remanding the matter to the district court for further discovery and a trial on the merits of the petitioner's claims; or to provide him

with such other relief as is fair and just in the circumstances.

Respectfully submitted,
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*Pro Se*

(any footnotes trail end of each document)

Summary Calendar
No. 06-10779
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TIMOTHY GREY,
Plaintiff – Appellant

v.

DALLAS INDEPENDENT SCHOOL DISTRICT; MANUAL VASQUEZ; CEDRIC PORTLEY; DAN CLAXTON; GARY HODGES; LUIZ TAMEZ,
Defendants – Appellees

February 14, 2008, Filed

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

COUNSEL: For TIMOTHY GREY, Plaintiff Appellant: John David Copeland, Dallas, TX.

For DALLAS INDEPENDENT SCHOOL DISTRICT; CEDRIC PORTLEY; DAN CLAXTON; GARY HODGES; LUIZ TAMEZ, Defendants Appellees: Eric V Moye, Dawn Kahle Doherty, Michael Wayne Massiatte, Vincent & Moye PC, Dallas, TX.

For MANUAL VASQUEZ, Defendant - Appellee: Todd R Hixon, Haakon Thomas Donnelly, Bellinger & DeWolf, Dallas, TX.

JUDGES: Before KING, DAVIS and CLEMENT, Circuit Judges.

OPINION

PER CURIAM: *

Timothy Grey was terminated from his employment as a security officer for the Dallas Independent School District ("DISD"). He sued the DISD and DISD supervisors Manual Vasquez, Cedric Portley, Dan Claxton, Gary Hodges and Luiz Tamez ("the Defendants") under Title VII and 42 U.S.C. § 1983. The district court granted summary judgment in favor of the Defendants and we affirm.

I. FACTS AND PROCEEDINGS

Grey was hired by DISD as a School Resource Police Officer in 2001. At all relevant times, Vasquez was Chief of DISD Department of Police and Security Services and Portley, Claxton and Hodges were Grey's supervisors. Tamez was DISD's Coordinator of Employee Hearings and Grievances. In January 2002, Portley discovered that Grey's driver's license had been suspended and assigned him to the dispatch office until the license situation was resolved. While this order was in place, Grey rode on patrol with other officers for several shifts. When Portley and Claxton confronted Grey about disobeying their direct order, Grey

responded by stating "you want to talk, we can talk to my attorney."[1]

On February 14, 2002, Portley and Claxton met with Grey to notify him that he was under investigation for insubordination for this and other incidents. On February 15, 2002, Grey filed a grievance against Vasquez, Portley and Claxton in which he claimed retaliation, hostile work environment and "despair treatment" for his "free speech" in requesting an attorney. In his first grievance, Grey stated that "Chief Vasquez has a history of practicing retaliatory conduct towards officers who opposed him or speak up for themselves. Vasquez also have [sic] been proven guilty for retaliation by the EEOC." Apart from the reference to the Equal Employment Opportunity Commission ("EEOC"), nothing in Grey's four page handwritten grievance related to Title VII-type discrimination. Tamez, the DISD administrator with whom the first grievance was filed, did not take any action to investigate the grievance or schedule a hearing. Grey contacted Tamez on March 19, 2002 to find out the status of his first grievance and Tamez told him to take it up with his immediate supervisor, which was in violation of a DISD policy requiring any administrator who received a grievance in error to forward it to the proper administrator and notify the grievant. In August 2002, after Grey had been terminated, Tamez discovered that the first grievance had not been resolved and he scheduled a hearing for Grey before Vasquez. Vasquez denied Grey's grievance on August 29, 2002.

On March 7, 2002, Portley, Claxton and Hodges recommended to Vasquez that Grey be terminated

based on his insubordination prior to and during the course of their February 2002 investigation. On April 30, 2002, Vasquez notified Grey in writing that he was recommending termination for reasons which included excessive absences and "[a]cts of insubordination and unprofessional remarks directed towards supervisors." Grey requested and received a hearing before a three-person judicial panel. The hearing took place on August 6-7, 2002.

Grey was represented by counsel and presented witnesses and evidence. The judicial panel affirmed Grey's termination in a written order dated August 14, 2002. Grey filed a charge of discrimination with the EEOC on January 22, 2004. The EEOC determined that "the evidence obtained during the investigation does not establish a violation of [Title VII]."

Grey, initially proceeding *pro se*, filed suit in district court on May 28, 2004. The Defendants filed motions to dismiss and motions for judgment on the pleadings, to which Grey filed responses. On April 4, 2005, five months before the discovery deadline, Grey served interrogatories and requests for production on the Defendants. The DISD complied with his discovery request by producing over 800 pages of business records under Rule 33(d) of the Federal Rules of Civil Procedure. On May 10, 2005, Grey wrote a letter to the court asserting that the discovery provided by the DISD was inadequate and that DISD was not willing to cooperate with him. On August 25, 2005, less than five working days before the discovery deadline, Grey's attorney entered a formal appearance for the first time and noticed the depositions of Vasquez and other DISD personnel. The Defendants filed motions for protective

orders and motions to quash his depositions, citing that the discovery deadline was August 31, 2005. On August 31, 2005, Grey filed a motion to compel discovery.

On September 30, 2005, Vasquez filed a motion for summary judgment. On October 27, 2005, DISD filed a motion for summary judgment. Grey never filed a response. On December 30, 2005, the district court granted summary judgment in favor of the Defendants. On the same day, the district court denied as moot Vasquez's motion to dismiss, DISD's motion for judgment on the pleadings, and the Defendants' motions to compel discovery. The district court granted the Defendants' motions for protective orders and motions to quash arising out of the August 2005 discovery dispute. The district court denied Grey's August 31, 2005 motion to compel discovery and found that "the Defendants' responses to Grey's discovery requests have been reasonable and complete."

On January 17, 2006, Grey filed a Rule 59(e) motion to vacate the judgment and attached additional evidence, including affidavits from several of Grey's co-workers. Vasquez filed a motion to strike the additional evidence. On June 14, 2006, the district court denied Grey's motion to vacate on the ground that the evidence he submitted "d[id] not qualify as newly discovered" and denied Vasquez's motion as moot.

Grey now appeals the grant of summary judgment, the denial of his motion to vacate, the denial of his motions to compel and the grant of the Defendants' motions for protective orders.

## *II. STANDARDS OF REVIEW*

This Court reviews a grant of summary judgment *de novo* and applies the same criteria as the district court. *Fed. Deposit Ins. Corp. v. Laguarta*, 939 F.2d 1231, 1236 (5th Cir. 1991). As this Court noted in *Little v. Liquid Air Corp.*:

> [T]he party moving for summary judgment must "demonstrate the absence of a genuine issue of material fact," but need not *negate* the elements of the nonmovant's case. If the moving party fails to meet this initial burden, the motion must be denied, regardless of the nonmovant's response. If the movant does, however, meet this burden, the nonmovant must go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial. . . . We resolve factual controversies in favor of the nonmoving party, but only when there is an actual controversy, that is, when both parties have submitted evidence of contradictory facts. *We do not, however, in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts.*

37 F.3d 1069, 1075 (5th Cir. 1994) (internal citations and quotations omitted).

The district court did not consider the materials Grey submitted with his Rule 59(e) motion, so we review the court's order for an abuse of discretion. *Ford Motor Credit Co. v. Bright*, 34 F.3d 322, 324 (5th Cir. 1994).

The district court's discovery rulings are reviewed for abuse of discretion. *Turnage v. Gen. Elec. Co.*, 953 F.2d 206, 208 (5th Cir. 1992).

## III. DISCUSSION

Grey, who is black, alleges that he was discriminated against on the basis of race within the meaning of Title VII, and that the district court's refusal to rule on his motion to compel discovery rendered him unable to prove that he was treated differently from similarly situated employees of other races. Grey alleges that he was retaliated against on the basis of his request for an attorney and his two grievances, and that this violated Title VII's anti-retaliation provisions. Grey argues that his termination violated his liberty interest in his reputation and his property interest in his continued employment with DISD.

Grey did not file a response to the Defendants' motions for summary judgment. "Rule 56 does not impose upon the district court a duty to sift through the record in search of evidence to support a party's opposition to summary judgment. Nor is it our duty to do so on appeal." *Stults v. Conoco, Inc.*, 76 F.3d 651, 657 (5th Cir. 1996) (internal citations and quotations omitted). Because Grey did not carry his burden to "designate specific facts showing that there is a genuine issue for trial," summary judgment was appropriate. *Id.* (internal quotations omitted).

### A. Title VII Discrimination

To prevail on his Title VII discrimination claim, Grey must establish a prima facie case of discrimination. *Tex.*

*Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). To establish his prima facie case, Grey must show that he is a "(1) a member of a protected class; (2) qualified for the position held; (3) subject to an adverse employment action; and (4) treated differently from others similarly situated." *Abarca v. Metro. Transit Auth.*, 404 F.3d 938, 941 (5th Cir. 2005). Once Grey as the plaintiff establishes his prima facie case,

> the burden shifts to the defendants to articulate some legitimate, nondiscriminatory reason for the employee's rejection. . . . [S]hould the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

*Burdine*, 450 U.S. at 253 (internal citations and quotations omitted).

The Defendants admit that Grey meets the first three elements of the prima facie case for discrimination, but they argue that he has not established the fourth element. They also argue that Grey's insubordination and habitual absences created a legitimate, nondiscriminatory reason for his termination. The district court found that Grey failed to establish a prima facie case of discrimination because he did not establish that he was treated differently from similarly situated employees of other races. The district court also noted that Grey did not attempt to show that the Defendants' legitimate nondiscriminatory reasons for their actions

were pretextual. On appeal, Grey admits that he had submitted no summary judgment evidence comparing himself to similarly situated non-blacks. Because Grey failed to establish a prima facie case of race discrimination, we affirm summary judgment as to Grey's Title VII discrimination claim. *Id.*

B. Title VII Retaliation

To establish a claim for Title VII retaliation, Grey "must make a prima facie showing: (1) that [he] engaged in activity protected by Title VII, (2) that an adverse employment action occurred, and (3) that a causal link existed between the protected activity and the adverse action." *Banks v. E. Baton Rouge Parish Sch. Bd.*, 320 F.3d 570, 575 (5th Cir. 2003) (internal quotations omitted). On appeal, Grey claims that he was retaliated against for telling Portley and Claxton that they should speak to his attorney, filing the February 15, 2002 grievance to protest the insubordination investigation, and filing the May 2, 2002 grievance to protest being recommended for termination. The district court found that Grey failed to establish a prima facie case of Title VII retaliation because he did not demonstrate that he engaged in protected activity. Upon review of the record, we affirm.

"Title VII does not require that a plaintiff prove that the conduct opposed was actually in violation of Title VII, but only that a charge was made, or that participation in an investigation of a violation of Title VII occurred." *Green v. Adm'rs of the Tulane Educ. Fund*, 284 F.3d 642, 657 (5th Cir. 2002) *abrogated on other grounds by Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 126 S. Ct. 2405, 2412-13, 165 L. Ed.

2d 345 (2006)). Here, Grey failed to prove that he engaged in activities protected under Title VII. Grey's first allegedly protected activity consisted of his statement to his superior officers, "you want to talk, we can talk to my attorney." Grey's second allegedly protected activity, his February 15, 2002 grievance, similarly did not refer to race, but claimed retaliation for "free speech." Grey's May 2, 2002 grievance stated that he was being terminated "strictly in retaliation in which Chief Manny Vasquez has taken out against me because of the grievance I filed for making such retaliatory comments and act of displaying discriminatory practices." In other words, Grey alleged in his second grievance that he was being retaliated against for filing the first grievance. Like the first grievance, the second grievance did not mention race. Both of Grey's formal grievances related to the same initial incident with his superiors, in which there was no mention of race nor any allegation of discrimination. The district court correctly concluded that Grey's retaliation claim failed because he did not show that he opposed activities protected under Title VII. *See* Banks, 320 F.3d at 575.

C. § 1983 Liberty Interest

Grey asserts that his termination violated his Fourteenth Amendment due process rights because he was a public employee "terminated for reasons that were false, publicized and stigmatizing." The district court rejected this claim and held that Grey "did not have a protected liberty interest in his reputation and good name as a matter of law." We affirm. This Court has stated that "mere injury to reputation, even if defamatory, does not constitute the deprivation of a

liberty interest." *Finch v. Fort Bend Indep. Sch. Dist.*, 333 F.3d 555, 561 n.3 (5th Cir. 2003) (rejecting a former school principal's claim of a liberty interest in her good name). The district court correctly rejected Grey's § 1983 liberty claim.

D. § 1983 Property Interest

Grey asserts that he has a protected property interest in his continued employment with DISD and that he was deprived of this interest without due process of law. The district court rejected this claim because Grey failed to demonstrate that he had a protected property interest in his employment. We affirm. Texas is an at-will employment state, and therefore Grey bears the burden of proving the existence of a contract establishing a property interest in his continued employment. *Schultea v. Wood*, 27 F.3d 1112, 1116 (5th Cir. 1994), *reh'g en banc granted*, 47 F.3d 1427 (1995). Grey did not point to any contract which altered his employment at-will status. The Defendants submitted affidavits and DISD policies showing that as support staff, Grey did not have a written contract and was an at-will employee. We find that Grey lacked a protected property interest in his DISD employment and we affirm the district court's grant of summary judgment on Grey's § 1983 property interest claim.

E. Discovery Motions

Grey appeals the district court's discovery rulings. He alleges that the district court abused its discretion by not granting his motions to compel and by quashing his depositions of the Defendants on the same day that it granted summary judgment against him. We find that

the district court did not abuse its discretion and we affirm.

With regard to his motion to compel, Grey notes that DISD released hundreds of pages of information from its grievance files but "refused to identify the participants by race." Grey states that without this information, he was unable to establish his Title VII claim of race discrimination. This argument is without merit for a number of reasons, including the fact that Grey could have relied on other evidence (including, for example, co-worker affidavits) to establish a genuine issue of material fact regarding DISD's disparate treatment of black security officers. Instead, Grey chose not to respond to the Defendants' motion for summary judgment. He now bears the consequences of that decision.

In ruling on Grey's motion to compel, the district court found that the DISD's discovery responses were "reasonable and complete." If Grey required further discovery in order to respond to the Defendants' motions for summary judgment, he should have requested a continuance under Rule 56(f). *See Washington v. Allstate Ins. Co.*, 901 F.2d 1281, 1285 (5th Cir. 1990). Grey neither filed such a motion nor a response to summary judgment showing why he was entitled to trial.

Even if we accept Grey's contention that additional discovery would have enabled him to prove his Title VII race discrimination claim, we are not required to find that the district court abused its discretion by denying his motion to compel discovery, because it was filed on the day of the discovery deadline after an

extensive discovery period. *Turnage v. Gen. Elec. Co.*, 953 F.2d 206, 209 (5th Cir. 1992) (holding that the district court did not abuse its discretion when it denied plaintiff's request to conduct potentially dispositive discovery, "given (i) the imminence of trial, (ii) the impending discovery deadline, and (iii) [plaintiff's] failure to request an inspection earlier"). The district court did not abuse its discretion when it denied Grey's motion to compel.

Grey also challenges the district court's decision to grant the Defendants' motions to quash and motions for protective orders. His claims are without merit. Granting protective orders because of impending discovery deadlines is not an abuse of discretion. *Id.* Grey noticed the August 29-30, 2005 deposition of two DISD employees on August 26, 2005. The discovery deadline set by the district court was August 31, 2005. The district court did not abuse its discretion when it granted the Defendants' discovery motions.

F. Motion to Vacate

Following the entry of summary judgment, Grey filed a Rule 59(e) motion to vacate. The district court denied the motion. Rule 59(e) motions to vacate or amend a judgment "must clearly establish either a manifest error of law or fact or must present newly discovered evidence." *Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir. 1990) (internal quotations omitted). The district court correctly stated that the additional evidence Grey appended to his motion to vacate (principally affidavits from Grey's former co-workers) was fully available to Grey at the time of summary

judgment. The district court did not abuse its discretion when it denied Grey's motion to vacate, and we affirm.

IV. CONCLUSION

The opinion and order of the district court granting summary judgment is AFFIRMED.

Footnotes

*Pursuant to 5TH CIR. R. 47.5, this Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

1Grey states that he obtained permission from Vasquez to ride with other officers instead of staying in the dispatch office.

CIVIL ACTION NO. 3:04-CV-1164K

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

TIMOTHY K. GREY,
Plaintiff,

VS.

DALLAS INDEPENDENT SCHOOL DISTRICT, and MANUEL VASQUEZ, CEDRIC PORTLEY, DAN CLAXTON, GARY HODGES, LUIS TAMEZ,
Individually,
Defendants.

December 30, 2005, Decided
December 30, 2005, Filed

**COUNSEL:** For Timothy Grey, Plaintiff: John D Copeland, Law Office of John D Copeland, Dallas, TX.

For Dallas Independent School District, Cedric Portley, Dan Claxton, Gary Hodges, Luiz Tamez, Defendants: Eric V Moye, Dawn Kahle Doherty, Sheri Crosby, Vial Hamilton Koch & Knox, Dallas, TX.

For Manual Vasquez, Defendant: Haakon T Donnelly, Todd R Hixon, Bellinger & DeWolf, Dallas, TX.

**JUDGES:** ED KINKEADE, UNITED STATES DISTRICT JUDGE.

**OPINION BY:** Ed Kinkeade

## OPINION

## MEMORANDUM OPINION and ORDER

Before the Court is Defendant Dallas Independent School District's ("DISD"), Cedric Portley ("Portley"), Dan Claxton ("Claxton"), Gary Hodges ("Hodges"), and Luis Tamez' ("Tamez") motion for summary judgment. Also before the court is Defendant Manuel Vasquez' ("Vasquez") motion for summary judgment. Because the Court concludes that all of Plaintiff Timothy Grey's ("Grey") claims fail as a matter of law, the Court **GRANTS** summary judgment for all Defendants on all of Grey's claims.

### I. Background Facts

This case arises out of Grey's termination from employment with DISD. Grey worked as a police officer with the Safety and Security Division of the DISD from approximately February 5, 2001 until August 15, 2002. The primary sequence of events giving rise to this action began in January 2002 when Grey's patrol car privileges were revoked due to the alleged suspension of his driver's license. Grey disputes that his license was ever suspended. Lieutenant Portley and Captain Claxton, also with the DISD Safety and Security Division, requested a meeting with Grey to discuss the status of his driver's license suspension. Grey agreed to the meeting, but requested that an attorney or other witness be present. Shortly thereafter, Chief Vasquez informed Grey that he was being removed from patrol duty and ordered to stay in the headquarters building. Grey alleges that this action was taken because he had requested an attorney.

On February 15, 2002, Grey filed a grievance (the "first grievance") with DISD claiming that Defendants Vasquez, Portley, and Claxton had created a hostile work environment in retaliation for his demand for an attorney. Grey alleges that Vasquez, Portley, and Claxton continued to create a hostile work environment by subjecting him to numerous disciplinary actions in retaliation for the filing of his first grievance.

On April 30, 2002, Grey received a letter from DISD placing him on administrative leave and recommending his termination. Grey claims that this action was also taken in retaliation for the filing of his first grievance. Grey then filed another grievance (the "second grievance") with DISD on May 2, 2002, to appeal the recommendation of termination.

On August 2, 2002, DISD convened an administrative hearing to consider Grey's case. The administrative hearing panel sustained the recommendation to terminate Grey and issued a decision on August 14, 2002, terminating his employment with DISD. The administrative panel concluded that Grey failed to provide any evidence that DISD had violated district policy or had acted arbitrarily or capriciously. Grey, however, claims that he did not receive his full grievance or appellate rights under DISD policy for either his first or second grievances.

Grey brought this action *pro se*, but his attorney filed an entry of appearance on August 25, 2005, before Defendants' motions for summary judgment were filed. Although Grey fully responded to the Defendants' motions to dismiss and motion for judgment on the pleadings, he has failed to respond to the Defendants'

motions for summary judgment. The Court notes that Grey has failed to come forward with any summary judgment evidence supporting his claims.

## II. Summary Judgment Legal Standard

Summary judgment is appropriate when the pleadings, affidavits and other summary judgment evidence show that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

The moving party bears the burden of identifying those portions of the record it believes demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 322-25. Once a movant makes a properly supported motion, the burden shifts to the nonmovant to show that summary judgment should not be granted; the nonmovant may not rest upon allegations in the pleadings, but must support the response to the motion with summary judgment evidence showing the existence of a genuine fact issue for trial. *Id.* at 321-25; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255-57, 106 S. Ct. 2505, 91 L. Ed. 2d 202(1986). All evidence and reasonable inferences must be viewed in the light most favorable to the nonmovant. *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1962). However, when no response to the motion for summary judgment is filed, the court may accept the movant's version of the facts as true and grant summary judgment when a prima facie showing for entitlement to judgment is made. *Eversley v. Mbank Dallas*, 843 F.2d 172, 174 (5th Cir.1988).

## III. Grey Failed to Establish a Prima Facie Case for Discrimination under Title VII and § 1983

Grey has brought claims for discrimination under 42 U.S.C. § 1983 and under Title VII of the Civil Rights Act, as amended at 42 U.S.C. 2000e et seq. Because Grey has failed to establish a prima facie case of race discrimination in that he has failed to show that he was treated differently than others similarly situated, the Court **GRANTS** summary judgment for all defendants on Grey's Title VII and § 1983 discrimination claims.

### A. Legal Standard

Discrimination claims brought under § 1983 and Title VII are analyzed under the same evidentiary framework. *See Lawrence v. Univ. of Tex. Med. Branch at Galveston*, 163 F.3d 309, 311 (5th Cir. 1999). In order to prevail on a claim for race discrimination, Grey must establish a prima facie case by showing that he was (1) a member of a protected class; (2) qualified for the position held; (3) subject to an adverse employment action; and (4) treated differently from others similarly situated. *See Abarca v. Metropolitan Transit Authority*, 404 F.3d 938, 941 (5th Cir. 2005). The *McDonnell Douglas* framework requires a plaintiff to first make out a prima facie case of discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 793, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). The burden of production then shifts to the defendants to establish legitimate non-discriminatory reasons for their actions. *Patrick v. Ridge*, 394 F.3d 311, 315 (5th Cir. 2004). If the defendant meets this burden of production, the burden of persuasion then shifts back to the plaintiff to demonstrate that there is a material issue of disputed

fact as to discrimination. *Id.*

**B. Analysis of Grey's Discrimination Claims**

Because Grey bears the burden of proof on his discrimination claims, Federal Rule 56 requires him to go beyond the pleadings and designate specific facts showing a genuine issue for trial. *See Celotex*, 477 U.S. at 324. The Court finds that Grey has failed to offer specific facts showing that he was treated differently from others similarly situated. Grey's complaint merely alleges that "DISD had an unwritten official policy of denying Black employees their grievance hearings while granting White employees their full procedural protections." Allegations setting forth conclusory facts and conclusions of law, however, are insufficient to survive a motion for summary judgment. *See Galindo v. Precision Am. Corp.*, 754 F.2d 1212, 1216 (5th Cir. 1985). Significantly, Grey has failed to identify any employee with whom he was similarly situated but treated differently. Without such a showing, Grey cannot establish a prima facie case of discrimination. *See Abarca*, 404 F.3d at 941.

Even if this Court were to conclude that Grey established a prima facie case of discrimination under Title VII and 1983, the Court finds that Defendants have rebutted any presumption of discrimination. Defendants have produced numerous non-discriminatory reasons for terminating Grey's employment, including several specific instances of insubordination and refusal to comply with orders, inappropriate conduct, failure to follow proper police procedure, the suspension of his driver's license, and unprofessional conduct toward co-workers. These

legitimate non-discriminatory reasons offered by Defendants are sufficient to defeat any presumption of discrimination that could have been raised by Grey's pleadings. *See Patrick v. Ridge*, 394 F.3d at 315. Because Grey has not attempted to show that any of these legitimate reasons offered by defendants are a mere pretext, or that race was a motivating factor in his termination, his claims for discrimination must fail. *See id.*; *Rachid v. Jack in the Box*, 376 F.3d 305, 312 (5th Cir. 2004). The Court therefore **GRANTS** summary judgment for all Defendants on Grey's Title VII and 1983 discrimination claims.

**IV. Grey's Retaliation Claims Fail as a Matter of Law**

**A. Grey's First Amendment Retaliation Claim Under § 1983**

Because Grey's First Amendment claim does not involve a matter of public concern, his retaliation claim under § 1983 fails as a matter of law. In order to establish a First Amendment retaliation claim under § 1983, Grey must show that (1) he suffered an adverse employment action; (2) his speech involved a matter of public concern; (3) his interest in commenting on the matter of public concern outweighed DISD's interest in promoting efficiency; and (4) the adverse employment action was motivated by his protected speech. *See Davis v. Dallas Area Rapid Transit*, 383 F.3d 309, 320 (5th Cir. 2004). Because Grey was speaking only as an employee on matters addressing his personal concern, his First Amendment 1983 claim must fail. *See Ayoub v. Texas A & M Univ.*, 927 F.2d 834, 837 (5th Cir. 1991).

This Court concludes that Grey's speech does not protect him from discharge under the First Amendment because his speech focused on his own individual interests rather than a matter of public concern. Matters of public concern include free and open debate about public affairs. *See Connick v. Myers*, 461 U.S. 138, 145, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983). Speech addressing matters of public concern is entitled to special protection under the First Amendment. *Id.* at 145. Here, Grey is an employee of a public agency, the DISD. Because almost anything that occurs within a public agency could concern the public, this Court must determine whether Grey's speech was made primarily in his role as a citizen or as an employee. *See Ayoub* at 837. Speech made primarily in a public employee's role as a citizen does not address matters of public concern. *Id.*

The plaintiff in *Ayoub*, a professor at Texas A & M University, alleged that he was retaliated against for complaining about the university's discriminatory practice of paying foreign-born professors less than native-born professors. *Ayoub*, 927 F.2d at 835. The Fifth Circuit Court of Appeals held that the plaintiffs speech, which consisted of verbal complaints and the filing of a salary grievance, was not a matter of public concern, because it focused only on his own individual compensation. *Id.* at 837. The Court's holding rested on the conclusion that the plaintiff had spoken as an employee on matters of purely personal interest, rather than as a citizen on matters of public concern. *Id.*

This Court likewise concludes that Grey's speech focused on his own individual interests. Grey's complaint alleges that DISD retaliated against him

because (1) he requested the presence of an attorney or other witness during a meeting with Defendants Portley and Claxton, and (2) he filed grievances with DISD. Having considered Grey's request for an attorney and reviewed both grievances filed by Grey, the court finds no evidence that Grey's speech involved a matter of public concern. As in *Ayoub*, Grey's speech, consisting of his attorney request and grievances, focused solely on his own employment conditions and personal interests. Such speech does not protect him from discharge under the First Amendment. *See id.* at 837. The Court therefore **GRANTS** summary judgment for all Defendants on Grey's First Amendment retaliation claims.

**B. Grey's Title VII Retaliation Claim**

Because Grey's Complaint does not allege a prima facie retaliation claim under Title VII, his claim fails as a matter of law. To survive summary judgment on a Title VII retaliation claim, Grey must make a prima facie case by showing that (1) he engaged in an activity protected by Title VII, (2) an adverse employment action occurred, and (3) a causal link existed between the protected activity and the adverse action. *See Banks v. E. Baton Rouge Parish Sch. Bd.*, 320 F.3d 570, 575 (5th Cir.2003). Grey has failed to make a prima facie case because he has not alleged that he engaged in an activity protected by Title VII.

Under Title VII, a protected activity is defined as opposition to any practice rendered unlawful by Title VII. *Ackel v. Nat'l Communs., Inc.*, 339 F.3d 376, 385 (5th Cir. 2003). Examples of such opposition include making a charge, testifying, assisting, or participating

in any investigation, proceeding, or hearing *under Title VII. Id.* Here, Grey's complaint does not allege opposition to any practice rendered unlawful by Title VII. In fact, the record contains no evidence that Grey opposed any employment practice on the basis of race, color, religion, sex, or national origin.

Grey's complaint alleges that he received a demotion in retaliation for requesting the presence of an attorney or other witness during a meeting with Defendants Portley and Claxton. Grey's demand for an attorney was to determine whether his driver's license had been suspended and had nothing to do with opposing Title VII discrimination and did not amount to a protected activity under Title VII.

Grey further alleges that his termination from DISD was in retaliation for the filing of his first grievance and for his request for an attorney. Having reviewed both grievances that Grey filed with DISD, the Court finds no evidence that Grey engaged in any protected activity under Title VII. In order to constitute a protected activity, Grey's grievances must at least allege that a Title VII violation occurred. *See Green v. Adm'rs of the Tulane Educ. Fund*, 284 F.3d 642, 657 (5th Cir. 2002). Neither grievance filed by Grey, however, makes any reference to a Title VII violation. Because Grey has offered no evidence that he engaged in any activity protected under Title VII, he has failed to establish a prima facie case for Title VII retaliation. The Court therefore **GRANTS** summary judgment for DISD on Grey's Title VII retaliation claim.

## V. Grey's Fourteenth Amendment Due Process Claims Under § 1983 Fail as a Matter of Law

Grey's Fourteenth Amendment Claims under § 1983 fail because he has not alleged a constitutional violation.

In order to state a valid claim for a Fourteenth Amendment violation in a § 1983 action, Grey must show that (1) he was deprived of a liberty or property interest, and (2) he was not given adequate procedural protection with respect to the violation. *See Kelleher v. Flawn*, 761 F.2d 1079, 1086 (5th Cir. 1985). Here, Grey has alleged a deprivation of his liberty interest in his reputation and good name, and a deprivation of his property interest in his employment. Because Grey does not have a constitutionally protected liberty interest in his reputation and good name, or a constitutionally protected property interest in his employment with DISD, the Court **GRANTS** summary judgment for all defendants on Grey's Fourteenth Amendment due process claims under § 1983.

### A. Grey Does Not Have a Protected Liberty Interest in His Reputation or Good Name

Grey alleges that his lack of opportunity to defend his reputation and good name was a denial of due process of law. However, the United States Supreme Court has repeatedly held that injury to reputation is not a constitutionally protected liberty interest. *See Siegert v. Gilley*, 500 U.S. 226, 233, 111 S. Ct. 1789, 114 L. Ed. 2d 277 *(1991); Paul v. Davis*, 424 U.S. 693, 708-09, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976)f. The plaintiff in *Siegert* received an "extremely unfavorable" credentials report

from his defendant supervisor, which resulted in the termination of his federal service employment. *Siegert*, 500 U.S. at 228. The plaintiff alleged that defamatory statements in his credentials review, and the lack of process afforded by the credentialing review, amounted to a violation of his due process rights. *Id.* at 232. The Court relied on *Davis* in holding that the plaintiff did not have a constitutionally protected interest in his reputation. *Id.* at 234. Relying on Siegert and *Davis*, this Court holds that Grey does not have a protected liberty interest in his reputation and good name as a matter of law.

**B. Grey Does not Have a Protected Property Interest in His Employment With DISD**

Grey also alleges that his property interest in his employment was taken from him without due process of law. Grey's claim fails, however, because he has not demonstrated that he has a clearly established property interest in his employment. *See Schultea v. Wood*, 27 F.3d 1112, 1116 (5th Cir. 1994), reh'g en banc, 47 F.3d 1427 (5th Cir. 1995). Because Texas is an employment-at-will state, Grey must demonstrate the existence of a specific contract in order to establish a property interest in his employment. *See id.* Although Grey's complaint alleges that he was employed by DISD pursuant to a written employment contract, he has failed to produce any evidence that such a contract existed. Without such evidence, Grey raised no genuine issue of material fact that an employment contract existed nor that he had a protected property interest in his employment. Because Grey has failed to demonstrate a protected liberty or property interest under the Fourteenth Amendment, the Court

**GRANTS** summary judgment for all defendants on Grey's due process claims under § 1983.

## VI. Grey's Civil Conspiracy Claim Under § 1985

The Court finds that Grey's allegation of civil conspiracy under § 1985(3) is wholly without merit. Neither Grey's Complaint, nor his subsequent arguments, set forth any operative facts supporting his conspiracy claim. Grey merely alleges the existence of a conspiracy to deprive him of his civil rights. Such bald assertions, unsupported by operative facts, are insufficient to support a civil rights conspiracy claim. *See Lynch v. Cannatella*, 810 F.2d 1363, 1370 (5th Cir. 1987). The Court therefore **GRANTS** summary judgment for all defendants on Grey's civil conspiracy claim under § 1985.

## VII. Grey's Claims for Breach of Contract and Intentional Interference With a Contract

Grey has also stated claims for breach of contract and intentional interference with a contract. However, as previously stated, Grey has failed to produce any evidence tending to show the existence of a valid contract. The existence of a valid contract is an essential element in a breach of contract claim. *Lewis v. Bank of Am. NA*, 343 F.3d 540, 544-45 (5th Cir. 2003).

The existence of a valid contract is also an essential element in a claim for interference with an existing contract. *Prudential Ins. Co. v. Financial Review Servs.*, 29 S.W.3d 74, 77-78, 43 Tex. Sup. Ct. J. 980 (Tex. 2000). Because Grey has failed to establish a genuine issue of material fact regarding the existence of a valid

contract, the Court **GRANTS** summary judgment for all defendants on Grey's claims for breach of contract and interference with a contract.

## VIII. Grey's Claim for Defamation

Finally, Grey brings a state-law defamation claim against defendant Vasquez. Vasquez argues that sovereign immunity shields him from liability arising out of Grey's defamation claim. The Court agrees. Unless waived, sovereign immunity protects the State and its officials from lawsuits arising out of tortious conduct. *See Texas Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 853, 45 Tex. Sup. Ct. J. 558 (Tex. 2000). Grey's claim against Vasquez in his official capacity is equivalent to a defamation claim against DISD and fails as a matter of law based on sovereign immunity. *See City of Beaumont v. Bouillion*, 896 S.W.2d 143, 146 n.5, 38 Tex. Sup. Ct. J. 282 (Tex. 1995). Vasquez has established that these claims are not exempted from sovereign immunity under the Texas Tort Claims Act, and Grey has failed to produce any evidence showing why sovereign immunity does not apply. The Court therefore **GRANTS** summary judgment for Vasquez on Grey's defamation claim based on sovereign immunity.

## IX. Conclusion

In conclusion, the Court **GRANTS** summary judgment for Defendants on all of Grey's claims. Grey has failed to establish a prima facie case for discrimination under Title VII or § 1983 because he has not shown that he was treated differently from others similarly situated. Grey has also failed to state a prima facie case for First

Amendment retaliation under § 1983 because his speech did not address a matter of public concern. His Title VII retaliation claim fails because he did not engage in any activity protected by Title VII. Grey's claims for violation of due process under the Fourteenth Amendment and § 1983 fail because he has not alleged a violation of constitutionally protected rights, and his § 1985 civil conspiracy claims fail because he has not alleged any operative facts to support his claims. Finally, Grey's claims for breach of contract and intentional interference with a contract fail because he has produced no evidence of an existing contract, and his defamation claim fails because sovereign immunity shields Vasquez from liability.

SO ORDERED.

Signed December 30th, 2005.

ED KINKEADE

UNITED STATES DISTRICT JUDGE

JUDGMENT

This Judgment is entered pursuant to the Court's Memorandum Opinion and Order, also entered on this day, in which the Court granted Defendants' Motions for Summary Judgment.

It is therefore, ORDERED, ADJUDGED and DECREED that Plaintiff Timothy Grey take nothing by this suit and that the claims presented are DISMISSED with prejudice, with all costs taxed against Plaintiff.

SO ORDERED.

Signed December 30th, 2005.

ED KINKEADE

UNITED STATES DISTRICT JUDGE

3/8/2008
Summary Calendar
No. 06-10779
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TIMOTHY GREY,
Plaintiff – Appellant

v.

DALLAS INDEPENDENT SCHOOL DISTRICT; MANUAL VASQUEZ; CEDRIC PORTLEY; DAN CLAXTON; GARY HODGES; LUIZ TAMEZ,
Defendants – Appellees

Appeal from the United States District Court for the Northern District of Texas, Dallas

ON PETITION FOR REHEARING

JUDGES: Before KING, DAVIS and CLEMENT, Circuit Judges.

PER CURIAM:

The petition for rehearing is out of time. The court has allowed the filing of the late petition for rehearing. IT IS ORDERED that the petition for rehearing is denied.